

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF ADOPTION AND
Rules I through V, and amendment of)	AMENDMENT
ARM 37.5.125 pertaining to Older Blind)	
Program)	

TO: All Interested Persons

1. On August 24, 2006, the Department of Public Health and Human Services published MAR Notice No. 37-389 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules, at page 1987 of the 2006 Montana Administrative Register, issue number 16.

2. The department has adopted New Rule V (ARM 37.18.110) as proposed.

3. The department has amended ARM 37.5.125 as proposed.

4. The department has adopted the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

RULE I (ARM 37.18.101) OLDER BLIND PROGRAM: DEFINITIONS

Definitions for purposes of this subchapter:

(1) through (3) remain as proposed.

(4) ~~"Division" means the Disability Services Division of the department.~~

"Department" means the Department of Public Health and Human Services.

(5) through (7) remain as proposed.

(8) "Independent living skills training" means training in compensatory skills, including use of adaptive equipment that allows ~~an individual~~ a consumer with visual impairments to cope with vision loss, perform daily living activities, and participate more independently in the community.

(9) and (10) remain as proposed.

(11) ~~"Legally blind" means a visual disability in which:~~

(a) and (b) remain as proposed.

(12) "Low vision" means a person has significant visual impairment that even with correction makes performance of daily tasks difficult.

(13) and (14) remain as proposed.

(15) ~~"Older blind person" means a person age 55 or older whose blindness or low vision makes competitive employment extremely difficult to attain or who does not want to pursue employment but for whom independent living goals are feasible.~~

(16) and (17) remain as proposed but are renumbered (15) and (16).

~~(18)~~ (17) "Program" means the Blind and Low Vision Services Program administered by the ~~division~~ department.

(19) through (22) remain as proposed but are renumbered (18) through (21).

~~(23)~~ (22) "Significant visual impairment" means a person has vision loss of acuity or field that even with correction limits a person's activities or ability to function in a normal manner.

(24) remains as proposed but is renumbered (23).

(24) "Totally blind" means a person has only light perception remaining or has no light perception.

(25) "Visual disability" means a person has been determined diagnostically to be totally blind, to be legally blind, to have low vision, or to have significant visual impairment.

AUTH: 53-2-201, 53-7-102, 53-7-302, 53-7-315, MCA

IMP: 53-7-301, 53-7-302, 53-7-303, 53-7-306, MCA

RULE II (ARM 37.18.102) OLDER BLIND PROGRAM: ELIGIBILITY (1) A person may receive older blind services if the program determines that the person:

(a) and (b) remain as proposed.

~~(c) is legally blind, has low vision, or a significant visual impairment~~ has a visual disability;

~~(d) due to the visual disability, will either have extreme difficulty in obtaining competitive employment or in the absence of an employment goal has feasible independent living goals;~~

~~(d)~~ (e) requires services available through the program that will contribute to the person's maintenance or increased independence; and

~~(e)~~ (f) meets the other requirements of this subchapter applicable to consumers program eligibility.

(2) ~~The presence of a visual impairment or impediment~~ disability and the need for program services may be determined by qualified staff based upon a functional assessment of the person's vision.

(3) through (4) remain as proposed.

AUTH: 53-2-201, 53-7-102, 53-7-302, 53-7-315, MCA

IMP: 53-7-301, 53-7-302, 53-7-303, 53-7-306, MCA

RULE III (ARM 37.18.103) OLDER BLIND PROGRAM: REDUCTION OF SERVICE POPULATION (1) ~~The division~~ department, in accordance with state and federal law, administers the program to assure the fiscal integrity of the program. If the division determines that there are insufficient fiscal or personnel resources to appropriately serve consumers, ~~the administrator of the division in consultation with the Montana Vocational Rehabilitation Council~~ department will limit service delivery based upon the criteria in (2) through (5).

(2) For the purposes of limiting service delivery in order to meet fiscal and personnel resources exigencies, the following categories are applicable:

(a) Category 1, for consumers already accepted into the Older Blind Program.

(b) Category 2, for consumers who are totally blind.

~~(b)~~ (c) Category 2 ~~3~~, for consumers who are legally blind and at risk of moving into a less independent environment due to vision loss.

~~(e)~~ (d) Category 3 4, for consumers with low vision (best acuity with correction of 20/80 or less in the better eye) or significant visual impairment that affects four or more areas of functioning, and consumers who are legally blind but not at risk of moving into a less independent environment.

~~(d)~~ (e) Category 4 5, for all other consumers with a significant visual impairment ~~who meet the eligibility criteria for the Older Blind Program.~~

(3) For purposes of implementing service delivery limitations due to insufficient fiscal or personnel resources, the division will close, as appropriate to meet the fiscal and personnel resources exigencies, one or more categories of service delivery beginning with level 4. For each service delivery category closed, the ~~division~~ department will initially close that category to further consumers. Consumers in that category already in receipt of services will continue to receive services unless it is necessary due to the exigencies to initiate closure of services to all persons in that category.

(4) If the ~~division~~ department determines that there are fiscal or personnel resources available to serve some, but not all, of the consumers in a particular service delivery category, the ~~division~~ department will continue to serve that number of consumers in that category for which it has adequate fiscal or personnel resources. Consumers to be served will be selected based upon the consumers' dates of application for the program beginning with the earliest date of application.

(5) If the ~~division~~ department determines that there are fiscal or personnel resources available by which to begin to open a previously closed service delivery category but not serve all possibly eligible persons in that category, the ~~division~~ department will serve that number of consumers for which it has adequate fiscal or personnel resources based upon the consumers' dates of application for the program beginning with the earliest date.

AUTH: 53-2-201, 53-7-102, 53-7-302, 53-7-315, MCA

IMP: 53-7-301, 53-7-302, 53-7-303, 53-7-306, MCA

RULE IV (ARM 37.18.106) OLDER BLIND PROGRAM: SCOPE OF SERVICES (1) Older blind services are services determined ~~necessary~~ by qualified staff to be necessary to assist a consumer with maintaining or increasing independence consistent with a consumer's priorities, concerns, abilities, interests, and choice.

(2) through (2)(m) remain as proposed.

(3) Services may be made available in the discretion of the program to enhance a consumer's independence, productivity, and to further the quality of life, and independence of consumers as a group. Those services include, but are not limited to:

(a) through (4) remain as proposed.

AUTH: 53-2-201, 53-7-102, 53-7-302, 53-7-315, MCA

IMP: 53-7-301, 53-7-302, 53-7-303, 53-7-306, MCA

5. The department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: Most consumers who are given notice that they will lose eligibility for the program due to limited use of services are not aware of the types of services available through the program. If they were aware, they could request and benefit from those services while remaining eligible for the program. The program should take the initiative to instruct consumers and potential consumers about the services that may be available.

RESPONSE: The department acknowledges that it is important to apprise consumers and potential consumers of the types of services that may be offered through the program. The department will instruct staff to better inform consumers and applicants about the services that may be made available through the program. This does not involve any changes in the rules as proposed.

COMMENT #2: Proposed Rule I(19) (ARM 37.18.101) defining "qualified blind and low vision staff" should be changed to require certification of program staff. The proposed rules speak of qualified staff but fail to specify what types of qualifications are needed.

RESPONSE: The department acknowledges that maintaining staff with qualifications that meet the highest standards in blindness rehabilitation is imperative to providing appropriate services for clients. The department requires that vision rehabilitation therapists (rehabilitation teachers) and Orientation and Mobility Specialists meet the standards for certification through the Academy of Certification for Vision Rehabilitation and Education Professionals (ACVREP). Although certification has merit, with the recruitment difficulties Montana experiences when competing nationally, the department would find filling positions even more difficult. Also, by not strictly defining "qualified staff", the department has the flexibility to hire trainees or interns into positions and require trainees to become fully qualified when the department is unable to recruit qualified staff in a reasonable timeframe. The department uses the personnel department, through position descriptions to define qualified staff. Training is available for staff to maintain and improve professional competencies.

COMMENT #3: Peer counseling is a great idea but does not appear to be used. Peer counseling needs to be implemented. The local Montana Association for the Blind chapters would be willing to help in this.

RESPONSE: The department acknowledges that peer counseling can be a very useful tool in assisting consumers. The department is supporting and developing local support groups. When appropriate or upon the client's request referrals are made to the Independent Living Centers, Montana Association for the Blind or Low Vision Montana, all of which have established peer counseling services. Rather than duplicate services, the department prefers to use existing services and focus our services toward services not available elsewhere.

COMMENT #4: Proposed Rule II(3)(a) (ARM 37.18.102), providing for termination

of a consumer upon realizing the goals of the consumer's independent living plan, should be changed to allow for continued eligibility through modifications to the goals in the consumer's plan.

RESPONSE: It is important to assure that the goals incorporated into a consumer's independent living plan are appropriate. Consequently, the goals of a plan may be subject at times to appropriate modifications if agreed to by the consumer and the program. The program, however, has limited funding and expenditures must be carefully monitored and controlled to stay within available appropriated funding. A further important consideration is that termination from the program upon realization of the consumer's goals serves to assure proper management of the program. Maintaining case management for inactive or limited services cases would limit the time that staff could apply to managing service planning and delivery for active cases. In addition, federal reporting requirements are being changed to emphasize an accounting of active cases only.

COMMENT #5: A consumer who is to be terminated from the program should not need to seek the review and hearing process provided for in the rule but rather allowed to refuse termination.

RESPONSE: The program has a very limited budget and as a result cannot allow for a consumer's continued eligibility after the appropriate set of independent living goals have been accomplished or otherwise resolved. The budget for the program, derived as federal funding under the federal act, is \$250,000. The Legislature has chosen not to make additional monies available for the program and no increase in the federal funding is expected. The department does not have discretionary funding to divert to this program.

COMMENT #6: Delays in delivery of services should be implemented in lieu of implementation of order of selection with the resulting terminations of consumers from the program.

RESPONSE: The federal authorities have repeatedly emphasized that Montana in relation to vocational rehabilitation services must proceed with implementation of the order of selection process for accommodating limited funding. The federal authorities are adverse to the use of service reductions or delays to address budget shortfalls when the order of selection could be implemented to limit enrollment to those with the greatest needs.

COMMENT #7: The order of selection should be modified so that when funding available is not adequate, those consumers who are financially able to purchase their own services are eliminated first.

RESPONSE: The department wishes to implement the order of selection in a way that does not unfairly disadvantage some classes of consumers or potential consumers. The comment presents an important factor not currently incorporated into the eligibility criteria. Eligibility for the program does not currently give

consideration to the individual incomes and resources of applicants. While the department is not modifying the order of selection for this purpose at this time, it is committed to reviewing eligibility criteria to determine the appropriateness of inclusion of consideration of income and resources criteria. However, it needs to be kept in mind that older blind persons have a unique financial situation which militates against the use of financial eligibility criteria for the program. Many older blind persons live on minimal fixed incomes yet have savings and assets set aside by which to meet the exigencies of medical, real property, and care costs. Due to these financial assets most persons currently within the potential service population would not be able to access older blind services if subject to the financial criteria established for the vocational rehabilitation program. Furthermore, the federal guidance for the program indicates that the intent is to provide services regardless of the financial status.

COMMENT #8: The implementation of program reduction, inclusive of order of selection, should not be precipitated by lack of appropriate personnel for the program. The lack of appropriate personnel is a problem that can be addressed through the provision of better compensation for the professionals necessary to the delivery of blind and low vision services.

RESPONSE: The department recognizes the merit of maintaining the professional staff necessary for the delivery of blind and low vision services. The department has pursued pay exceptions and other measures by which to foster the recruitment of qualified persons into those professional positions. Recruitment has proven to be more complicated than just a matter of higher salaries. The department will continue to maintain an appropriate professional staff and welcomes ideas about measures that will assist in that effort. While the department does not intend to limit eligibility in the program for categories of persons solely upon the availability of adequate professional staffing, it believes it is necessary to preserve its discretion to control for the number of eligible persons based upon critical factors inclusive of available funding and the ability to deliver services in a professionally appropriate manner.

COMMENT #9: The local chapters of the Montana Association for the Blind should be notified when a consumer is terminated from the program. The association has members who are financially able and willing to assist consumers.

RESPONSE: The department cannot as a matter of course share confidential information with the association or its members. If a peer counseling program, as suggested in another comment, or a transition assistance program, as suggested in this comment, were developed, appropriate procedures would be needed to assure that the consumers involved in such efforts were providing proper authorizations for the sharing of confidential information.

COMMENT #10: The department when implementation of the order of selection becomes necessary should terminate first those persons who otherwise have access to services through other programs.

RESPONSE: The comment presents an important factor not currently incorporated into the eligibility criteria. Eligibility for the program does not currently give consideration to the services applicants may have through other programs. While the department is not modifying the order of selection for this purpose at this time, it is committed to reviewing eligibility criteria to determine the appropriateness of inclusion of consideration of the availability of services through other programs.

COMMENT #11: The proposed rules provide that the Vocational Rehabilitation Council will serve as an advisory body in the exercise of implementation of an order of selection should it be necessary to limit the availability of the program. This is not the most appropriate advisory body for implementation of order of selection for the purposes of the Older Blind program. Advice should be received from a new council for the Older Blind program or from the State Independent Living Council.

RESPONSE: The department has removed the reference to the Vocational Rehabilitation Council. For purposes of implementation of the order of selection for the older blind services the department agrees it should not depend solely upon advice from the Vocational Rehabilitation Council. The department, however, would not establish a new advisory council. The executive branch of government, of which the department is a part, is currently seeking, as a matter of governmental efficiency, to consolidate the number of advisory bodies and therefore the department could not entertain at this time the establishment of any further advisory bodies.

COMMENT #12: References in the proposed rules to division should be to the Division of Visual Services established at 2-15-2205, MCA. The department should comply with 2-15-2205, MCA. Currently, that division is administered in conjunction with the Disability Services Division and the Division of Visual Services is not even acknowledged in organizational charts.

RESPONSE: The rules have been modified to remove direct references to "division" and the definition of "division" as meaning the "Division of Disability Services" has also been removed. The department's organizational rule at ARM 37.1.101 does include recognition of a "blind and low vision services division". The rule further provides that "The disability services and blind and low visions (sic) divisions are administered by a single division administrator." This consolidation of administration was established initially and continues to be in place as a measure of efficiency. An executive determination was made that the scope of blind and low vision services with the very small service population does not merit an entirely separate administrative structure that would divert the limited funding available for the services to the maintenance of unnecessary administrative personnel and systems.

COMMENT #13: Eligibility in Proposed Rule II(1)(c) (ARM 37.18.102), should include the category of "totally blind". This would be in parallel to the disability categories appearing on the Rehabilitation Services Administration Form 70B used for purposes of federal reporting on older blind services.

RESPONSE: The department agrees with the comment and has modified the rules

to provide for the inclusion of this category of eligibility. The term "totally blind" does appropriately define a definitive segment of the service population. A definition of "totally blind" has been included in the definitions of proposed Rule I (ARM 37.18.101). The inclusion of this category accented the need to reconfigure the language in section (1) of proposed Rule II (ARM 37.18.102), Eligibility, to better state the eligibility criteria. This resulted in the use of the term "visual disability" in the language. In turn "visual disability" was inserted into the definitions and defined to be inclusive of "total disability", "legally blind", "significant visual impairment", and "low vision". Also the term "older blind person" as defined in proposed Rule I (ARM 37.18.101), was removed and the substantive language in the definition of that term moved to where it rightfully needed to appear in the eligibility provision of proposed Rule II(1) (ARM 37.18.102).

COMMENT #14: The blind and low vision services, in light of the requirement for a Division of Blind and Low Vision Services, should have its own budget, inclusive of federal Title I match funding. This would be an assurance of the integrity of blind and low vision services.

RESPONSE: The rule set does not include any matters pertaining to state budgeting practices. Generally, programmatic rules adopted by state agencies cannot govern state budgeting practices which are governed by particular statutes. The department could explore with the Governor's Budget Office the possibility of budgeting processes of presenting a line item in the departmental budgets for blind and low vision services in the future.

/s/ Cary Lund for
Rule Reviewer

/s/ Joan Miles
Director, Public Health and
Human Services

Certified to the Secretary of State January 2, 2007.